87-1513

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.,
Respondents.

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF THE SECURITIES INDUSTRY ASSOCIATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. When Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, expressly prohibits affiliates of member banks of the Federal Reserve System from "engag[ing] principally" in underwriting and dealing in *all* "securities" without exception, and when this Court repeatedly has held that the Act's prohibitory terms must be applied "as they were written," did the court below err in upholding a split decision of the Federal Reserve Board disregarding the plain statutory language and excepting government securities from the scope of Section 20's flat prohibitions?

2. When Section 20 prohibits bank affiliates from "engag[ing] principally" in underwriting and dealing in non-government securities, did the court below err in permitting bank affiliates to do so regularly as an integral part of their business?

PARTIES TO THE PROCEEDING

In addition to the petitioner[1] and respondent listed in the caption, the following are also respondents in this action: Alan Greenspan, as Chairman of the Board of Governors of the Federal Reserve System; Manuel H. Johnson, Martha R. Seger, Wayne D. Angell and H. Robert Heller as Members of the Board of Governors of the Federal Reserve System; and Bankers Trust New York Corporation, J.P. Morgan & Co., Citicorp, The Chase Manhattan Corporation, Manufacturers Hanover Corporation, Chemical New York Corporation and Security Pacific Corporation, as Intervenors-Respondents-Cross-Petitioners.[2]

1. Pursuant to Rule 28.1 of this Court, *amicus curiae* Investment Company Institute states that it is the national association of open-end investment companies (commonly known as mutual funds), their investment advisers and their principal underwriters. The Institute has 2,417 mutual fund members with over 29 million shareholders and assets of approximately $865 billion.

2. Paul A. Volcker, Chairman Greenspan's predecessor as Chairman of the Board of Governors of the Federal Reserve System, was named as a respondent below.

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Amicus Curiae Investment Company Institute (the "Institute") respectfully submits this brief in support of the Petition of the Securities Industry Association (the "SIA") requesting that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on February 8, 1988.

INTEREST OF THE INSTITUTE

The Institute is the national association of open-end investment companies (commonly known as mutual funds), their investment advisers and their principal underwriters. The Institute is generally recognized as the primary spokesman for the mutual fund industry and, as such, has been intimately involved in numerous judicial and administrative proceedings with respect to the scope and application of the Glass-Steagall Act, both as a party, *see, e.g., Board of Governors* v. *Investment Company Institute*, 450 U.S. 46 (1981) *("Board of Governors")*; *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) *("Camp")*, and as *amicus curiae*. *See, e.g., Securities Industry Association* v. *Board of*

Governors, 468 U.S. 137 (1984) (*"Becker"*). The Institute participated in this case before the Board of Governors of the Federal Reserve System (the "Board") and submitted a brief *amicus curiae* in the court below.

The Institute has a substantial interest in this case because its members are adversely affected by the administrative exercise of legislative power affirmed by the Court of Appeals. Notwithstanding the Congressional intent embodied in the Glass-Steagall Act to "abolish the security affiliates of commercial banks," *Camp*, 401 U.S. at 629, and Congress' repeated reaffirmation of this fundamental national policy, the Second Circuit affirmed a decision of a majority of the Board, entered over the strong dissent of Chairman Volcker and Governor Angell, which sanctioned their recreation.

The members of the Institute are further directly aggrieved by the unprecedented interpretation of the Glass-Steagall Act endorsed below. Although most members of the Institute do not underwrite the specific securities at issue in the precise applications here involved, they are concerned that the language and rationale of the majority opinion will be extended to authorize incursions into other areas of the securities business, including the mutual fund business, forbidden to bank affiliates by Congress over fifty years ago. There already are indications that this concern is well-founded.[1]

STATEMENT OF THE CASE

The Institute adopts the statement of the case set forth in the Petition of the SIA.

REASONS FOR GRANTING THE WRIT

As the SIA has demonstrated in its Petition, the judgment below raises profound questions of national importance. The

1. *See, e.g., Chase Account Links Returns to Stock Prices*, Wall St. J., March 19, 1987, at 26, col. 2 (noting the upcoming filing of an application by The Chase Manhattan Corporation with the Board to create bank affiliates engaged in the mutual fund business under the rationale of the Board majority opinion under review).

SIA also has shown that the Second Circuit's decision contravenes the decisions of this Court as well as the language, structure and purpose of Section 20 of the Glass-Steagall Act. The Institute concurs fully in these arguments.

Action by this Court is also necessary because the opinion below fundamentally misconceives the role of administrative agencies and courts in effectuating the basic policy decisions Congress has mandated in the financial services arena. The Board has made no secret of *its* belief that bank affiliates should be permitted to engage in the securities activities at issue here. The Glass-Steagall Act, however, reflects *Congress'* considered legislative judgment that whatever "policies of competition, convenience, or expertise" might be furthered by commercial bank securities affiliates are outweighed by the dangers and hazards that arise when banks seek to combine the business of banking with the business of underwriting and dealing in securities. *Camp*, 401 U.S. at 630.

The duty of the Second Circuit was to give effect to this legislative judgment and not, by affirming the Board majority opinion, to subvert it. As this Court has instructed, if existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the Board or the courts, to address." *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

The Second Circuit endorsed the recreation of bank securities affiliates by approving the Board majority's exception of government securities from the scope of Section 20's "securities" underwriting bar. The plain language of Section 20, however, prohibits bank affiliates from engaging principally in the underwriting of *all* "stocks, bonds, debentures, notes or other securities," and contains no exceptions at all. *See* 12 U.S.C. § 377. The advertence of that omission is demonstrated by Section 21 of the Glass-Steagall Act, which *does* expressly exempt government securities, and which shows that Congress knows how to draft and include an exception for government securities where it wants one to apply. *See* 12 U.S.C. § 378.

Moreover, as the Institute demonstrated before the Board and the Second Circuit, Section 19(e) of the Glass-Steagall Act confirms that Congress intended Section 20 to apply to all securities without exception. Section 19(e), which governed the activities of bank holding companies between 1933 and 1966, was intended to prohibit bank holding companies from being affiliated with any entity formed for the purpose or engaged principally in the underwriting of "stocks, bonds, debentures, notes or other securities *of any sort*."[2] As this Court has recognized, the standard of Section 19(e) *"is the same standard as is contained in § 20."* *Board of Governors*, 450 U.S. at 69, n.43 (emphasis supplied). And, as the Board itself has conceded, when Congress repealed Section 19(e) in 1966 and amended Section 20 to bring bank holding companies within its scope, Congress intended no substantive change in the law but "in effect merely substituted § 20 for § 19(e)."[3]

Unable to reconcile its administrative government securities exception with Section 19(e), the Board majority simply ignored Section 19(e) in its decision. The Second Circuit sought to fill the gap by arguing that Section 19(e) was unhelpful, since its "securities of any sort" language somehow made the unqualified term "securities" in Section 20 "ambiguous."

This argument ignores the statutory structure. As set forth above, both this Court and the Board have recognized that Sections 19(e) and 20 are of identical reach. The "securities of any sort" prohibition in Section 19(e) thus creates no ambiguity in Section 20, but confirms that Section 20 applies, "as it was written," *Camp*, 401 U.S. at 639, to *all* "securities" without exception.

Corrective action by this Court is all the more urgent in light of the adamance with which Congress has adhered to its original

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2. 48 Stat. 162, 188 (emphasis supplied), codified at 12 U.S.C. § 61, *repealed*, Pub. L. No. 89-485, § 13(c), 80 Stat. 236, 242 (1966).

3. Petition of Respondent Board of Governors of the Federal Reserve System for Rehearing and Suggestion for Rehearing En Banc at 8, *Investment Company Institute* v. *Board of Governors*, 606 F.2d 1004 (D.C. Cir. 1979), *rev'd*, 450 U.S. 46 (1981).

policy decision to abolish bank security affiliates. Over the past 25 years, the banking industry repeatedly has requested Congress to lift or modify the Act's flat prohibitions.[4] In fact, the banking industry repeatedly has sought the authority to underwrite and deal in the exact securities that are at issue in the instant applications.[5] Notwithstanding these entreaties, however, Congress deliberately has refused to give even the slightest additional power to affiliates of member banks.[6]

Thus, the point here is not merely that the Chairmen of both the House and Senate Banking Committees have issued public statements decrying the applications approved by the Board majority's ruling,[7] or that Congress passed legislation designed to impose a moratorium by force upon these and similar Board approvals until March 1, 1988. The point, as the Board itself declared earlier in this proceeding, is that "Congress is the [only] appropriate forum for resolution of the public policy considerations involved" in such "novel proposals" that would "dramatically alter the framework established by Congress in the Glass-

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4. *See, e.g.*, H.R. Rep. No. 1631, 91st Cong., 2d Sess. 28-29 (1970) (defeat of bills authorizing banks to underwrite shares in bank mutual funds). *Compare, e.g.*, S. 1720, 97th Cong., 1st Sess. (1981) (proposing authority for banks to underwrite revenue bonds and mutual funds) *with* Pub. L. No. 97-320, 96 Stat. 1469 (1982) (containing no such authority). *See also* S. 2592, 99th Cong., 2d Sess. (1986) (proposing to allow bank holding companies to establish depository institution securities affiliates—proposal dropped from amended bill); S. 1609, 98th Cong., 1st Sess. (1983); S. 2181, 98th Cong., 1st Sess. (1983) (proposing to allow banks to underwrite and distribute mortgage-related securities and shares of investment companies).

5. *See Hearings on S. 1933 and S. 2474 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 93d Cong., 2d Sess. 6, 136 (1974) (noting that legislation authorizing banks to underwrite and deal in revenue bonds had been introduced and defeated in 1935, 1938, 1945, 1955, 1957, 1962, 1963, 1965, 1967, 1973, and 1975).

6. Indeed, as recently as 1984 the House refused to approve legislation to authorize bank affiliates to underwrite the three specific securities the majority's ruling now has purported to authorize administratively. S. 2851, 98th Cong., 2d Sess. (1984).

7. *See* Letter from William Proxmire, Chairman of the Senate Banking Committee, to Paul Volcker, Chairman of the Federal Reserve Board (Jan. 30, 1987), *reprinted in* 133 Cong. Rec. S4022-23 (Mar. 27, 1987); *The Bond Buyer*, May 4, 1987, at 3.

Steagall Act for the conduct of the commercial banking and the investment banking businesses." *Citicorp*, 71 Fed. Res. Bull. 225, 225 (1985). "The realignment of our nation's financial industries is for the elected representatives of our nation to bring to fruition by comprehensive legislation, and not for fiat by * * * administrative policymaking." *A.G. Becker, Inc.* v. *Board of Governors*, 519 F. Supp. 602, 616 (D.D.C. 1981) (footnote omitted), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd*, 468 U.S. 137 (1984)."

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8. Congress continues to consider whether, and to what extent, the existing barriers separating commercial from investment banking should be dismantled. For example, the Senate Banking Committee recently reported legislation which, if enacted, would grant commercial banks the precise powers the Board majority has attempted by administrative fiat to bestow upon them. Other Senators, the Chairman of the House Banking Committee, the Chairman of the House Committee on Energy and Commerce, and members of the House, however, have expressed strong concern over the bill and its wholesale abandonment of the national banking policy embodied in the Glass-Steagall Act. *See* "Election Politics Formed Senate Bill's Shape," *American Banker*, March 7, 1988, at 3; "Aide: Dingell Stands Firm Against Underwriting," *American Banker*, March 8, 1988, at 9; "Dingell Opposes Bill Defining Insider Trading," *Wall Street Journal*, March 9, 1988, at 2. Under our form of government, it is only the Congress, and not the administrative Boardroom, which constitutes the proper forum for resolution of these issues.

CONCLUSION

For these reasons, and those set forth in the Petition of the SIA, the requested Writ of Certiorari should issue.

Respectfully submitted,

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